

Surrogate Mother Validity against Children's Civil Status: Comparative Study, Surrogate Mother in Indonesia and Ukraine

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Abstract : Nowadays, technology is getting more advanced. For example, IVF or "In Vitro Fertilization (IVF)" with a surrogate mother. A surrogate mother is a woman who has no relationship at all with a spouse who owns the seed then makes an agreement with them to rent out her uterus in exchange for material things. This study aims to determine the Surrogate Mother validity in Indonesia and in Ukraine on born children's civil status. This study employed normative juridical methods. The findings revealed Surrogate mothers is not allowed as it against the existing law in Indonesia. This is stated in Article 127 of Law Number 36 the Year 2009, the prohibition of the surrogate mother agreement. However, if a child is born from a Surrogate Mother, his civil status will be of surrogate mother's child. In Ukraine, on the other hand, the surrogate mother is legal. This is stated in Article 123 of the Family Code of Ukraine 2002, the children's civil status is a genetic child of a spouse who owns the seed.

Keywords: Agreement, Child, Civil Status, Surrogate Mother of state sovereignty.

Keabsahan Surrogate Mother terhadap Status Keperdataan Anak : Studi Perbandingan Surrogate Mother di Indonesia dan Ukraina

Abstrak : Saat ini, teknologi semakin maju. Diantaranya adalah Bayi Tabung atau "In Vitro Fertilization (IVF)" dengan bantuan Ibu Pengganti atau Surrogate Mother. Surrogate Mother adalah seorang wanita yang tidak memiliki hubungan sama sekali dengan pasangan suami istri pemilik benih dan kemudian membuat perjanjian atau kesepakatan dengan pasangan suami istri untuk menyewakan rahimnya dengan imbalan yang biasanya berupa materi. Tulisan ini bertujuan untuk mengetahui keabsahan Surrogate Mother di Indonesia dan keabsahan Surrogate Mother di Ukraina terhadap status keperdataan anak yang dilahirkan, dengan menggunakan metode penelitian yuridis normatif. Dan hasil dari penelitian ini adalah bahwa di Indonesia Surrogate Mother tidak diperbolehkan karena bertentangan dengan hukum yang ada di Indonesia khususnya terdapat dalam Pasal 127 Undang-Undang Nomor 36 Tahun 2009 yang melarang perjanjian Surrogate Mother dan jika ada anak yang lahir dari Surrogate Mother maka status keperdataan anak yang dilahirkan menjadi anak dari Surrogate Mother tersebut. Sedangkan di Ukraina, Surrogate Mother dilegalkan berdasarkan pada Article 123 of the Family Code of Ukraine 2002 (Pasal 123 Kode Keluarga Ukraina Tahun 2002) dan status keperdataan anak tersebut adalah anak genetik dari pasangan suami istri yang memiliki benih.

Kata Kunci: Anak, Perjanjian, Status Keperdataan, Surrogate Mother.

INTRODUCTION

Every spouse expects a baby or offspring. However, some spouses are less fortunate as they could not get the offspring due to some problems in their reproductive system. Over time, technology in the medical field has progressed. Thus, married couples can have children or offspring more easily. There are many ways that have been found such as IVF. In vitro fertilization (IVF) is the fertilization of the spouses' sperm and egg in the laboratory. John C. Fletcher classifies IVF into two types, "In Vitro Fertilization (IVF) using sperm of husband or donor" and "Egg of Wife or Surrogate Mother".¹ "Egg of Wife or Surrogate Mother" is further divided into more than one type. Having IVF

¹ Husni Thamrin, 2014, "Aspek Hukum Bayi Tabung Dan Sewa Rahim (Perspektif Hukum Perdata dan Hukum Islam)", Aswaja, Yogyakarta: Presindo, Pg. 13-14.

by fertilizing the sperm and egg of a legal partner, then implanting the fertilization or embryo in the Surrogate Mother's uterus.²

A Surrogate Mother is a woman who has no relationship with the spouses who own the seeds and reaches an agreement with them.³ The agreement includes the surrogate mother who lends or rents out her uterus by carrying the result of the fertilization until the delivery. The child must be handed over to the child's genetic parent or spouses who owned the seed as stated in the previous agreement. The surrogate mother is usually rewarded with material form.⁴ This surrogate mother has the initial goal of helping unfortunate married couples who have problems with their reproductive system to have a child. In its development, there have been many shifts in the meaning and substance of surrogate mother, from the initial goal as an alternative to having a baby or offspring due to problems in the reproductive systems of the married couple shifted to aesthetic reasons and making the uterus as a business field reason.⁵

In Indonesia, according to Article 127 paragraph (1) of Law No. 36 of 2009 concerning health, "the implementation of IVF can only be done by a legal spouse. The result of sperm and ovum fertilization from the spouses must be implanted in the uterus of the wife who has the ovum". This means that the surrogate mother in Indonesia is not allowed. The year 1988 was the first year of successful implementation of IVF in Indonesia. This was marked by the birth of the first IVF at the Harapan Kita Hospital, Jakarta.⁶ If it is reviewed juridically, this surrogate mother is included in the agreement law regulated in the Civil Code. However, if it is viewed further from Article 1320 of the Civil Code, the surrogate mother does not meet the legal requirements of the agreement. Accordingly, Indonesia does not legalize this. On the other hand, a surrogate mother is no longer a taboo thing to do in foreign countries including America and European countries. Some countries in Europe that have legalized surrogate mothers are Ukraine, Russia, Georgia, and Poland. Meanwhile, in America, not all of its states legalize surrogate mothers. There are several states against the existence of a surrogate mother such as New York.⁷ Surrogate mother has actually been around for a long time. In Ukraine, for instance, the first surrogate mother was introduced in 1995 in Kharkiv. It has continued to grow until now. Thus, Ukraine has been named one of the world's uterus rental business centers.⁸ This is because in Ukraine the surrogate mother has long been legalized. This refers to Article 123 of the family code of Ukraine in 2002.⁹ Accordingly, the researchers formulated the following research questions: How is the validity of surrogate mothers in Indonesia and Ukraine, and what is the civil status of children born from Surrogate Mothers in Indonesia and Ukraine. The researchers are interested in this problem because there are many differences regarding the legal norms of surrogate mothers in Indonesia and Ukraine. For this reason, the researchers focus on these matters.

RESEARCH METHODS

In conducting this research, the author will use the normative juridical research method. The problem method that the author uses is a comparative approach, the data source used by the author is

² Desriza Ratman, 2012, "*Surrogate Mother dalam Perspektif Etika dan Hukum: Bolehkan Sewa Rahim di Indonesia?*", PT. Elex Jakarta: Media Komputindo, Pg. 35-36.

³ Muhammad Fatkhur Rizqi Amin, "Analisa Yuridis Terhadap Perjanjian Sewa Rahim Dalam Perspektif Hukum Perdata Dan Hukum Islam", *Dinamika: Jurnal Ilmiah Ilmu Hukum*, Vol.26 No.5 Februari 2020, Pg. 652.

⁴ Muhammad Ali Hanafiah Selian, "*Surrogate Mother: Tinjauan Hukum Perdata dan Islam*", *Jurnal Yuridis*, Vol.4 No.2 December 2017, Pg.132.

⁵ Desriza Ratman, *Op.Cit.*, Pg. 38.

⁶ Husni Thamrin, *Op.Cit.*, Pg. 12-13.

⁷ Filda Achmad Al Yadainy, Skripsi: "Perjanjian Surrogate Mother/Sewa Rahim Dan Pengaruhnya Terhadap Status Anak Yang Dilahirkan". UIN Walisongo, Semarang, 2019, Pg.7.

⁸ M. Reznik, Yuliia M. Yakushchenko, "Legal Considerations Surrounding Surrogacy In Ukraine", *Wiadomości Lekarskie* Vol.LXXIII No.5 May 2020, Pg.10.

⁹ Marwati Arlita, undergraduate thesis: "Pengaturan Hak Melanjutkan Keturunan Dalam Perjanjian *Surrogacy* (Sewa Rahim). Universitas Mataram", Mataram, 2017, Pg.viii.

equipped with the main legal material, namely the 1945 Constitution of the Republic of Indonesia and auxiliary legal materials in legal form obtained through literature studies are books, journals and theory. Then qualitatively analyze the collected data and explain it in narrative form.

RESULTS AND DISCUSSION

1. The Validity of Surrogate Mother in Indonesia

Efforts for the artificial insemination program in Indonesia have been around for a long time. The Year 1998 was established as the year of the successful implementation of IVF. This was marked by the birth of a child to Markus's husband and wife Chai Ai Lian at Harapan Kita Hospital, Jakarta, on May 2, 1988, who was named Nugroho Karyanto.¹⁰ Indonesia allows IVF only to a legal spouse. They can fertilize sperm and eggs in the laboratory. Then, the result of this fertilization is implanted in the wife's uterus. IVF in Indonesia is no longer a taboo thing. This is because it is well-known in the wider community. Furthermore, several public figures also use the IVF method, such as the married couple, Irwansyah and Zaskia Sungkar.¹¹

To the discovery of the IVF method with the Surrogate Mother, technology in the medical field continued to develop. The Surrogate Mother agreement cannot be separated from IVF. This is because the Surrogate Mother agreement is included in IVF technology. The implementation of the Surrogate Mother agreement is included in the practice of IVF. This is because it is similar to IVF, fertilizing sperm and eggs from both legal partners. However, the IVF with surrogate mother involved fertilizing sperm and eggs or embryos and insert them into the surrogate mother's uterus, not the wife's uterus.¹² From various types of IVF techniques, the implementation of the Surrogate Mother agreement is included as one of the IVF techniques. A surrogate mother is a woman who has no relationship with the spouses who own the seeds, then reaches an agreement with them.¹³ The agreement includes the Surrogate Mother lending or renting out her uterus by carrying the result of the fertilization until delivery. Then, the child must be handed over to the child's genetic parent or partner who owned the seed as stated in the previous agreement. The Surrogate Mother is usually rewarded with material form. In Indonesia, Surrogate Mother is still unknown to many people. However, around 2009, there was a rumor of a public figure renting out her womb, Zarima Mirafsur. The news did not have strong evidence.¹⁴ This is because there is a pro and contra regarding surrogate mothers among the community and scholars in Indonesia. According to Article 127 paragraph (1) of law no. 36 of 2009 concerning health, "the implementation of IVF is not for everyone. This is only for legitimate couples where the results of the fertilization of the spouses' sperm and ovum must be implanted in the wife's ovum". This means that surrogate mother is prohibited in Indonesia.¹⁵

From a legal perspective, Surrogate Mother can be classified as contract law or agreement. Its provisions are regulated in the Bugerlijk Wetboek or the Civil Code. However, the implementation of the Surrogate Mother agreement still requires a more in-depth study of whether the agreement is valid or not. In this case, it refers to Article 1320 of the Civil Code which explains the validity of the agreement. At the time of the agreement, the subjective conditions should have

¹⁰ Husni Thamrin, *Loc.Cit.*

¹¹ Prasetyo D, "11 Artis Yang Berhasil Menjadi Pejuang IVF Dari Dulu hingga Sekarang", <https://www.popmama.com/pregnancy/getting-pregnant/fx-dimas-prasetyo/artis-yang-berhasil-menjadi-pejuang-ivf-dari-dulu-hingga-sekarang/11> , accessed on December 25, 2020.

¹² Nyoman Angga Pandu Wijaya, I Wayan Novy Purwanto, "Surrogate Mother Menurut Hukum Di Inonesia", *Kertha Semaya*, Vol.3 No.1 Januari 2015, Pg. 2.

¹³ Muhammad Fatkhur Rizqi Amin, "Analisa Yuridis Terhadap Perjanjian Sewa Rahim Dalam Perspektif Hukum Perdata Dan Hukum Islam", *Dinamika: Jurnal Ilmiah Ilmu Hukum*, Vol.26 No.5 Februari 2020, Pg. 652.

¹⁴ (n.d), "Sewa Rahim Di Indonesia Dilakukan diam-diam", <https://health.detik.com/ibu-dan-anak/d-1370505/sewa-rahim-di-indonesia-dilakukan-diam-diam> , accessed on December 25, 2020.

¹⁵ Dewi Astika Tandireung, "Analisis Perjanjian Innominaat Terhadap Peminjaman Rahim (*Surrogate Mother*) Di Indonesia", *Amanna Gappa*, Vol.26 No.1 March 2018, Pg. 17.

been fulfilled. The two parties must reach an agreement and must be competent. The implementation of the Surrogate Mother agreement is still hampered by one of the conditions, the condition of "a cause that is lawful or not forbidden". This is stated in Paragraph 4. The promised agreement of the surrogate mother is about a woman who rents out her uterus. The object of the agreement is the uterus, the human reproductive system which is prohibited from being leased. In other words, the object of the agreement is invalid. This is because it does not meet the requirements stated in Paragraph 4 of Article 1320 of the Civil Code. Apart from being based on the Civil Code and Law No. 36/2009 concerning Health, the implementation of Surrogate Mother has also been labeled as Haram by MUI (Indonesian Ulema Council) on May 26, 2006. However, so far in Indonesia there is no specific prevailing law that explicitly regulates the implementation of the Surrogate Mother. Therefore, the Surrogate Mother agreement can only be based on the existing Laws and Regulations, such as the Prevailing Laws, Fatwa MUI, and KHI (Compilation of Islamic Law) which form the legal basis for most Indonesian Muslims.

2. The Validity of the Surrogate Mother in Ukraine

In contrast to Indonesia, Ukraine is included in one of the four European countries that allow the implementation of surrogate mothers. This is to the extent that commercial surrogacy for foreign citizens is allowed. Russia, Georgia, and Poland are other European countries that also allow the implementation of surrogate mothers and commercial surrogacy. In addition, Ukraine has long been one of the most popular destinations for international child adoption and since 2009 Ukraine has grown to become one of the destination countries known as the center for implementing surrogacy that accepts foreign citizens. The implementation of the Surrogate Mother in Ukraine has been legalized by the local government. In Ukraine, the practice implementation of the Surrogate Mother is legally regulated in Article 123 of the Family Code of Ukraine (Article 123 of the Family Code of Ukraine in 2002). However, not all women in Ukraine can become surrogate mothers. According to Order of the Ministry of Healthcare of Ukraine from September 09, 2013 No 787 "Order manual of appliance of assisted reproductive technologies establishes order of ART appliance, Item 6.4 states that " a surrogate mother must be a woman who is healthy, is an adult (over 18 years), and has given birth to a healthy child. At the same time, it must be emphasized that, according to Ukrainian law, no one can practice child pregnancy of the Surrogate Mother. This is because only legally married couples can do so. Accordingly, the married couple is required to include a marriage certificate as a required document. In the case where the husband and wife are foreign citizens, the documents stating they are legally married couples must be legalized. This is in line with the provisions of the 5 October 1961 Convention on the Abolition of Legalization Requirements for Foreign Public Documents.¹⁶ Furthermore, in Ukraine, it costs around \$ 38,000-45,000 to use Surrogate Mother (with an egg donation if required). Surrogate Mothers are paid \$ 300-400 each month during pregnancy and a total of \$ 15,000 after delivery.¹⁷

3. The Children's Civil Status Born from Surrogate Mother in Indonesia and Ukraine

In Indonesian law, every born child will get a status. This is stated under the Civil Code and Law Number 16 Year 2019, the status of the child is divided into two, legitimate and illegitimate children. In Law Number 1 of 1974 concerning Marriage, precisely, Article 42, explains that "a legitimate child is a child born in or as a result of a legal marriage". In addition, according to the Civil Code, precisely, Article 250, "a legitimate child is a child born or raised during the marriage. Thus, the husband is his father". Meanwhile, based on Law Number 1 of 1974 concerning Marriage,

¹⁶ (n.d), "Legal Position On Fertility Treatment in Ukraine", <http://www.fertilitysolutionsinternational.com/wp-content/uploads/2015/09/Legal-Position-On-Fertility-Treatment-in-Ukraine.pdf> , accessed on December, 25 2020.

¹⁷ (n.d), "Ukraine's surrogate mothers struggle under quarantine", <https://www.opendemocracy.net/en/odr/ukraines-surrogate-mothers-struggle-under-quarantine/> , accessed on December 27, 2020.

especially, Article 43 paragraph (1), "illegitimate children are children born outside marriage and illegitimate children only have a civil relationship with their mother and their mother's family."¹⁸

The child's status based on Indonesian law. To determine the child's status of the Surrogate Mother in Indonesia, it must first be seen from the marital status of the Surrogate Mother. This is because the Surrogate Mothers carrying the results of the fertilization of the husband and wife who owns the seeds until they give birth to the child. The child born from the Surrogate Mother is a legal child if the Surrogate Mother has a legal marriage. However, according to Law Number 1 of 1974 concerning Marriage, especially, Article 44 paragraph (1) "a husband can reject or deny the legal status of a child born by his wife if it is proven that his wife has committed adultery and the child is the result of adultery. The status of the child will be changed to illegitimate children". The status of the child will also be different, the child born to the surrogate mother will have the status of illegitimate children if the Surrogate Mother is unmarried or widowed. According to Islamic law, determining the parentage of the Surrogate Mother's child can only be based on *Itjihad*. According to several cleric opinions and fatwas issued by the MUI, the implementation of the Surrogate Mother is haram. This is because the agreement covers the leased of the uterus which is a part of the human body. Besides, the uterus will carry the seeds of the spouses who have no relationship with the surrogate mother. The status of the child will be illegitimate. This applies to the child of all surrogate mothers with legal marriage, unmarried, or widowed status. Furthermore, the child will only have a heredity relationship with the surrogate mother. Meanwhile, the married couples who own the seeds will have a relationship as genetic parents of surrogate mother's child only by DNA testing. The civil status of the child will still depend on the Surrogate Mother's status. The only way the spouses who own seed can have full rights to a child is through adoption.¹⁹

4. Inheritance rights of children born from Surrogate Mother based on Civil Law

the surrogate mother's child will have a status determined by the surrogate mother's status, a mother who is pregnant and gives birth to the child, even though the child does not come from her fertilization. The status of the children will later affect their inheritance rights. According to civil law in Indonesia, if the child is the legal child of the Surrogate Mother, the child has the right to receive a full inheritance from the surrogate mother and her husband.²⁰ According to the Civil Code, specifically, Article 852, "a legitimate child will get the inheritance of their parents, grandparents, or their next blood relatives in a straight line upward, without distinguishing gender or the birth order. They will inherit in equal portions per person". However, if the status of the child is an illegitimate child, the distribution of the inheritance is different. Based on Article 863 of the Civil Code, "if the heir dies have a legal offspring and have illegitimate children, and a husband or wife who is left behind, then the illegitimate child will get 1/3 of the inheritance".²¹

The status of the surrogate mother's child is illegitimate because it is considered as the result of adultery. Thus, the inheritance rights will be different. This is because the child only has civil relations with her mother and her mother's family. The inheritance right of an illegitimate child according to Article 869 of the Civil Code, "the child is not entitled to claim an inheritance from his father. However, the father must provide sufficient living adjusted based on his financial capacity. This is under Articles 867 and 868 of the Civil Code."²²

¹⁸ Sonny D. Judiasih, Susilowati S. Dajaan, and Deviana Yunitasari, 2016, "*Aspek Hukum Sewa Rahim Dalam Perspektif Hukum Indonesia*", Bandung: Refika Aditama, Pg. 18.

¹⁹ Filda Achmad Al Yadainy, *Op. Cit.*, Pg. 107.

²⁰ Desriza Ratman, *Op. Cit.*, Pg. 70.

²¹ Wahyu Tri Yuliana, A. A. Aditya Dharma Saputra., "Analisa Hak Mewaris Bagi Anak Yang Lahir Melalui Proses Bayi Tabung Dalam Perspektif Hukum Perdata", Jurnal HUMANI (Hukum dan Masyarakat Madani), Vol.9 No.1 May 2019, Pg. 9.

²² *ibid*

5. Inheritance rights of children born from Surrogate Mother based on Islamic law

According to Islamic law in Indonesia, the status of a child born to a Surrogate Mother is an illegitimate child. Based on KHI (Compilation of Islamic Law), Article 100, which has the same formula as Law Number 1 of 1974 concerning Marriage, Article 43 paragraph (1) states "the illegitimate child only has a parentage relationship with his mother and his mother's family. The child born from the Surrogate Mother is only entitled to inherit property from the mother."²³

6. Civil Status of Children Born from Surrogate Mother in Ukraine

Unlike Indonesia, Ukraine already has a law explaining the status of children born to surrogate mothers. Based on Article 123 of the Family Code of Ukraine (Article 123 of the Family Code of Ukraine in 2002) "a child born by a surrogate mother will become a child of a married couple who has seeds". If the husband and wife, the seed owner, are foreign citizens, according to the Order of the Ministry of Healthcare of Ukraine from September 09, 2013 No 787, "Order manual of appliance of assisted reproductive technologies" establishes order of ART appliance Item 6.8, states that "if the child who born from surrogate mothers who have parents or whose seeds owners are foreign citizens, they must provide their residential address before processing documents and depart from the country for protection by pediatric specialists and for supervision".²⁴ According to the Order of the Ministry of Healthcare of Ukraine from September 09, 2013 No 787 "Order manual of appliance of assisted reproductive technologies" establishes order of ART appliance Item 6.9, states that "the registration of children born from surrogate mother is done based on the determined regulation which stipulated by current Ukrainian law and accompanied by a certificate of genetic association of the parent (mother or father) with the child".

CONCLUSION

Indonesia does not have specific laws or regulations on surrogate mothers. Thus, this is not possible to be implemented in Indonesia. According to the Civil Code, Article 1320, "a lawful cause", the implementation of surrogate mother does not meet Paragraph 1 and article 2 concerning "a cause that is lawful or not prohibited". Furthermore, this also violates Law no. 36 of 2009 concerning Health, specifically, Article 127 paragraph (1) and the Fatwa MUI on May 26, 2006. In Ukraine, on the other hand, surrogate mother practice is permitted and has been regulated in Article 123 of the Family Code of Ukraine (Article 123 of the Family Code of Ukraine of 2002). Referring to previously mentioned rules that exist in Indonesia, if the surrogate mother already has a legal husband, the child's status becomes a legal child. However, if the Surrogate Mother is not married or a widow, it will be changed into an illegitimate child and the spouse who owned the seeds will only be the genetic parents of the child without legal status. Meanwhile, in Ukraine, the status of the child born to the surrogate mother in Ukraine is the legal child of the husband and wife who owns the seed.

SUGGESTION

From this research, it is suggested that the government immediately pay attention to this surrogate mother agreement. This is because in Indonesia there are no regulations or laws that clearly regulate this matter. Later if after careful examination, its implementation is haram and violates existing norms, then, there is the need to create a regulation containing prohibitions and sanctions regarding this matter. Furthermore, the government should also hold socialization about this beforehand. This is because surrogate mother is still very taboo in Indonesia. Thus, it is expected that

²³ Nurantiana, Ahyuni Yunus, Ilham Abbas., "Status Kewarisan Anak Yang Lahir Dari Hasil Sewa Rahim (*Surrogate Mother*) Menurut Hukum Perdata dan Kompilasi Hukum Islam", *Journal of Lex Generalis (JLG)*, Vol.1 No.4 September 2020, Pg. 583.

²⁴ Viktoriia Shchyrskya, dkk., "Ethical And Legal Aspects Of Surrogacy In Ukraine And In The World", *Journal of Legal, Ethical and Regulatory Issues.*, Vol.23 No.20 2020, Pg. 3.

the regulations or laws in this matter would provide justice, certainty, and bring benefit to all Indonesian people.

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